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NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JESSICA NICOLE BRADFORD,<br><br>Defendant and Appellant. | C077516<br><br>(Super. Ct. No. 11F6931) |

A jury found defendant Jessica Nicole Bradford guilty of the first degree murder of her newborn baby. The trial court sentenced her to an indeterminate term of 25 years to life in prison. The evidence showed that defendant delivered her baby in secret, carried it to a remote location where she hid it, and failed to give it any nourishment. The baby died three days after it was born.

Defendant argues: (1) a juror was improperly dismissed, (2) the jury should not have been instructed on the felony-murder theory of first degree murder, (3) the kidnapping instruction was erroneous, (4) the trial court failed to give a limiting

instruction regarding the evidence of defendant's prior pregnancy, (5) there was insufficient evidence that defendant caused the baby's death, (6) the trial court should have given a corpus delicti instruction, and (7) cumulative error.

Although we find there was error in the trial court's felony-murder and prior acts instructions, and that the trial court should have given a corpus delicti instruction, we conclude defendant did not suffer prejudice from these errors, either individually or cumulatively, and shall affirm the judgment.

In a supplemental brief defendant requested a limited remand pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*), to give her an opportunity to make a record that may be helpful at a future youth offender parole hearing. We will remand the matter so that the trial court may follow the procedure outlined in *Franklin*.

## FACTUAL AND PROCEDURAL BACKGROUND

The baby's body was discovered at the Julian Youth Academy (Academy), a Christian camp in Whitmore where defendant was a staff member. Alexandra Valencia, one of the staff members who lived in a dormitory with defendant, went into defendant's room to get some extra blankets for Kori Alugas, who was moving into the dorm. As she was looking through a bin of blankets, Valencia noticed an awful smell as if something had died. When she grabbed one of the blankets, the body of a baby rolled out. Valencia did not think the body was real, and she called Alugas in from the other room to show her. Alugas also did not think the baby was real. They left the baby where they had found it, knowing defendant would return to the room soon.

The next day Valencia and Alugas went back to defendant's room to search for the baby, but it was no longer there. Valencia reported what they had seen to her supervisor, Tiffany Morgan. Later that day, Shasta County Sheriff's Deputy Craig Tippings contacted defendant, who led him to the utility room adjacent to her dormitory. He found a dead baby under a pink pillow inside a laundry basket.

Detectives Brian Jackson and Eric Magrini interviewed defendant. She told them that she had been dating her boyfriend, Jovan Castillo, for the last three years. Castillo also worked at the Academy. Defendant denied Castillo had known she was pregnant. She said Castillo had asked her why her stomach was getting big, but she told him she did not know, and she tried to hide her pregnancy by wearing larger clothes. She did not tell Castillo she was pregnant because she was scared, and she did not tell anyone else because she was afraid she would lose her job. Also, she did not want to disappoint anyone. She had been raised in a Christian home and had been taught not to have sex until she was married.

Defendant said she gave birth on September 19, 2011, around 1:00 a.m. on a Monday morning. She gave birth under the deck outside her dorm. She went outside to give birth " 'cause I didn't know if anyone else was in . . . the building or anything.' " She said she stood up and the baby dropped out of her. There was no umbilical cord attached to the baby. Defendant said: "And then I didn't hear her breathing or anything and I was like oh, what do I do? So I was like, like kinda like hitting her back. Not like hard. But just like trying to get her to breathe or something and nothing happened. So then um, I just like sat there and like held her and then I got in my car and I [was] just like holding her in there. And then I like, then I like showered and . . . I just spent the night in my car with her 'cause I was like so devastated. I couldn't tell anyone . . . ." When defendant showered she pulled the umbilical cord out of herself and flushed it down the toilet.

Defendant said the baby did not move at all after being born. She was not alive. The baby's eyes were open, and she expelled a substance on the blanket. Detective Jackson asked defendant why she did not call for help when she realized the baby was not breathing. She replied, "I [was] just scared I guess. I don't really . . . have an explanation. . . ." Defendant said she was going to bury the baby but decided to keep it in her room under some blankets.

The detectives asked defendant if she had ever helped deliver a baby or been in a hospital where a baby had been born. She said no, that the closest she had come was seeing the movie "Knocked Up." She had been sexually active with Castillo for about two years. They relied on condoms for birth control. In response to questioning, she admitted she had an earlier pregnancy scare with Castillo, but she had not been pregnant. The detectives asked her if Castillo would have been excited to learn she was pregnant. She replied, "I think he woulda been bummed because like it's both of our jobs and . . . we both moved up here . . . to do this and stuff like that."

Later in the interview, defendant admitted she had given birth to another baby in March of 2010, but it had been stillborn. Contrary to her earlier claim that she did not tell Castillo she was pregnant this time because he would have been "bummed," she said she did not tell Castillo because he had been "heartbroken" when she lost the first baby and she did not want to "put him through that again."

When detective Jackson told defendant he was concerned the baby had been born alive and she had not been honest with them, she admitted the baby had been born alive. Defendant said she had tried to breastfeed the baby, but nothing would come out. Defendant said she did not know what to do. She said, "I just like took care of her with, tried to feed her and I guess she just starved. But I didn't like harm her or anything. Like it wasn't intentional. . . ." Defendant said the baby had lived about four days.

Defendant said she had taken the baby to an empty apartment on the campus. She had slept there with the baby and had checked on her during work. She said she had tried to get the baby to take regular milk, but she did not have any bottles. When asked why she did not just tell someone she had a baby and needed help, she responded, "I don't fucking know."

Defendant told detectives that when she went to check on the baby on Thursday, the baby had died. She said no one had heard the baby crying because the people who lived next to the empty apartment had been out of town. She said the baby had cried

infrequently. She said, "I tried . . . giving her water and stuff. I knew like no nutrition . . . was in it or anything." When asked again why she had not called for help, she responded, "I don't know. I regret it so much."

Detective Jackson asked defendant if she thought she would be better off without the baby and she replied: "The only reason . . . I think like that is because if I had a baby then I don't have a job. And . . . I don't have a place to live . . . and then Jovan doesn't have a job and he doesn't have a place to live. . . ."

Detective Jackson interviewed defendant again the next day. He asked defendant to walk him through how she took care of the baby. She said that after the baby was born she spent most of the night in the car with the baby. She woke up and went to sleep in her room for a couple of hours, leaving the baby in the car. She returned to the car with the baby and stayed there until 12:00 or 1:00 p.m. She then took the baby to the apartment and tried to breastfeed her, but it did not work. She tried to feed the baby water. She left the baby at the apartment alone at 3:00 p.m. while she returned to campus to do her laundry and shower. When she got back to the apartment, the baby had "pooped," so she bathed her in the sink and tried to give her water again. She kept the baby in the apartment the entire time because she did not want anyone to see the baby.

The night following the early morning birth of the baby, defendant went to Redding with Castillo at 5:00 p.m. and left the baby at the apartment. Defendant and Castillo went to a Winco Foods grocery store where defendant said she bought alcohol, but she did not buy anything for the baby. Defendant returned to the Academy around 2:00 or 3:00 a.m., and she went to visit the baby from then until 6:00 a.m.

Defendant then returned to her room to sleep. She was pretty sure she woke up and went back to visit the baby at the apartment. The baby was sleeping, and defendant tried to breastfeed her again. However, the baby would latch on and "fall asleep kinda." Defendant tried, but could not get any milk to come out of her breast, so she tried to give the baby water again with either her finger or with a cup.

On Tuesday afternoon or evening, defendant went back to Redding with Castillo to get groceries, leaving the baby in the apartment. Defendant left the door unlocked, and was not worried about anyone finding the baby because no one usually went there. Defendant kept the baby away from the window in an open closet area.

Defendant knew that she had only 48 hours to safely surrender the baby. "And I was like okay, what am I gonna do? And then I was like it's Wednesday tomorrow and I have to work. I was like I'll just take a sick day and I'll take her and um, so I like went to work and I was like acting like I didn't feel good. And um, Tiffany [Morgan] was just like well just stick it out or whatever. So I didn't take the day off. So then I was just like, I was like okay, what am I, I'll just wait 'till my days off and hopefully she'll make it."

Detective Jackson confronted defendant, saying, "You know that wasn't gonna happen. I mean how many times a day do you eat?" Defendant replied, "I know." Detective Jackson continued: "[Y]ou didn't do anything to help her. . . . You didn't wanna affect Jovan's life. You didn't wanna affect your life. You were more concerned about those things than hers. Okay. So you let her die. How loud did she scream at times the days before she passed, from hunger?" Defendant replied, "[S]he was just like crying. She didn't really scream and I comforted her."

Defendant said she did not name the baby because if she named her it would make it real. She said, "I didn't feel like I could name her after like what I did to her." The detective asked, "What'd you do to her?" Defendant replied, "I . . . didn't take care of her."

Castillo testified that when defendant had been pregnant with their first child, they had discussed the need for her to have an abortion so they would not both lose their jobs. Castillo thought that defendant had taken the Plan B pill and terminated the pregnancy, but learned months later that defendant was still pregnant. Defendant delivered a baby girl in the hospital. The baby was placed on life support. They made the decision to take

the baby off life support because they were told she had been deprived of oxygen and would likely be mentally handicapped. Defendant and Castillo returned to work and kept the birth a secret.

Sheriff's deputies recorded a conversation between defendant and Castillo after he found out the second baby had been born alive. Castillo asked defendant what had happened to the baby, and she responded, "Just, she didn't make it." Castillo asked, "How?" Defendant responded, "I didn't take good and go to the hospital and . . . I didn't have my milk and I didn't . . . I don't know. I just didn't. Doesn't fucking make any sense. I am sorry. And I'm, I don't deserve anything. I don't, I'm sorry." Defendant also said, "I didn't . . . feed her. But not on purpose. Like I just didn't go and buy stuff for her." Castillo asked why she had not taken the baby to a safe surrender site, and she said, " 'Cause I couldn't let her go. She's so beautiful."

Alugas had worked at the Academy on several occasions. At one point she became pregnant, and although she was treated well, she was not allowed to continue to work while she was pregnant. After she delivered her baby, she returned to work and brought her baby with her. She returned the January before defendant had the baby in September. Alugas regularly brought her baby to work, or if she could not, other staff members would watch the baby. Alugas and her child lived in the apartment in Pasture 2, the same apartment in which defendant kept her baby. When she left the apartment in August, she left behind blankets, a bed, a playpen, a breast pump, and plastic nipples. There were also baby bottles and miscellaneous plasticware in the apartment.

Anna Mace also worked at the Academy. One afternoon she parked next to defendant's truck and heard a young infant crying. The crying seemed to be coming from somewhere in the middle of the truck. She could not see anything inside the truck or anywhere in the vicinity. The prosecution introduced the temperature records for the week of September 19, 2011. The high temperatures were as follows: September 19 was

94 degrees Fahrenheit; September 20 was 96 degrees; September 21 was 98 degrees; September 22 was 99 degrees; and September 23 was 100 degrees.

Dwayne Smith was irrigating near the Pasture 2 apartment early one morning in September when he heard an infant crying. He walked to the front of the apartment and saw no cars. He got in his truck and drove toward the office to see if anyone knew whether someone was staying in the apartment. On the way, he spoke to Blaize Morgan, who said he did not know that anyone was living in the apartment, and was surprised to hear that Smith heard a baby crying. Morgan called over the radio to ask if anyone was staying in the Pasture 2 apartment, and a female voice responded that no one was staying there. Smith went to the staff room to obtain the key to the apartment, but the key was gone. Smith drove to the maintenance shed to retrieve a second set of keys. As he drove to the apartment, he passed defendant, who was driving in the opposite direction. When Smith got to the apartment, it was empty.

When defendant was interviewed, she claimed she had done a Google search to find out how to make her breast milk come faster. A forensic search of defendant's computer showed no searches for the word "breastfeeding" but showed defendant had searched for "abortion [p]ill for cheap," "Planned Parenthood," "at home abortions," "abortion pill," "babies in the first trimester," "always hungry, Plan B," "Plan B, One Step pharmacists, side effects and tolerability," "How to use vitamin C to bring on a delayed period," "home abortion remedy vitamin C," and "Vitamin C abortions." There were data files in both defendant's phone and laptop that had been deleted.

Expert testimony indicated that a newborn baby could live for about four days without food or water, but if the temperature were warm death would be accelerated due to dehydration. After an autopsy, the forensic pathologist concluded the baby had been full term and fully developed when she was born. There were no abnormalities and everything looked normally developed. The baby did not die from obvious trauma, but the pathologist could not exclude starvation, dehydration, or asphyxia as a cause of death.

The doctor who delivered defendant's first baby testified regarding the details of that birth. He testified that when defendant came to the emergency room with her first baby, she was ready to deliver and she had a fever. Her water had broken two days before she came into the emergency room. Defendant had chorioamnionitis--an infection in the amniotic fluid around the baby. The doctor testified it is likely the baby would have lived if defendant had come in when her water broke.

A social worker who saw defendant after the first birth also testified. She stated that after the baby died defendant was sitting in her room smiling, which had not seemed appropriate. Defendant had acted as if the baby's death was no big deal. Defendant told the social worker that there would have been a stigma attached to being pregnant because she and her boyfriend worked at a Christian camp, and they were not supposed to have sexual relations.

The defense presented the testimony of Dr. Stephen Pine, an obstetrician/gynecologist. Dr. Pine testified that he believed defendant had delivered the baby precipitously, noting that the umbilical cord had been ripped, not cut. He testified that in such a case the baby would bleed potentially for several minutes until the cord was clamped down. Since defendant had not clamped the cord, the baby could have bled for a while and become severely anemic, which could have led to dehydration and a weakened state. Dr. Pine believed the baby could have had an infection, pneumonia, or some sort of lung aspiration. He opined that when the umbilical cord tore away, it could have caused severe damage of internal organs, and that the baby would not have been able to feed well if it had anemia and an infection.

## DISCUSSION

### I

### Discharge of Juror

After the prosecutor had questioned defense expert Dr. Pine, Juror No. 796658 told the court outside the presence of the jury that during the cross-examination Juror

No. 761446 had called the prosecutor a bitch multiple times. The court asked whether any of the other jurors had heard the comments, and Juror No. 796658 said she was "pretty sure" Juror No. 772906 had heard. Juror No. 796658 said Juror No. 761446 had repeated "fuck" and "bitch" to the prosecutor regarding the way she was questioning the witness, but to her knowledge had not said anything outside the courtroom.

After Juror No. 796658 left the courtroom, the court reporter stated that another court reporter told her she thought she had heard the juror call the prosecutor a bitch, but had not reported it because she was not sure.

Juror No. 761446 was then brought in and asked whether he had made any comments about the prosecutor. He responded: "I know I made a comment. I don't think it was about her. I think it was about going after credibility. . . . [¶] . . . [¶] I mean, it's, like, enough already. The guy's got all kinds of, you know, credentials, so I don't think we have to beat everybody up, just assume they're lying right off the get-go." Juror No. 761446 claimed at first he did not remember calling the prosecutor a derogatory name. When the court asked whether he had called her a bitch, he said he did not remember, then added, "I think I would be more apt to say she was a 'witch' than a 'bitch'. I usually use that saying if I'm referring to somebody that I'm disagreeing with." Juror No. 761446 claimed he did not use the word "bitch" very often, and said he did not think he had used the term in court. He also claimed to rarely use the word "fuck." Juror No. 761446 claimed he did not realize he had said anything loud enough for anyone to hear because "obviously, it wouldn't go over too good." He said he thought the prosecutor was "being rather severe." He said, "I think it's overdoing it to ask a doctor with 14 degrees where he got each one of them."

Juror No. 761446 denied attempting to influence any other jurors. The trial court inquired whether he would be able to deliberate fairly despite having labeled the prosecutor a bitch. He responded: "I don't think that really has anything to do with the facts of this case."

The court then called Juror No. 772906 and asked whether Juror No. 761446 had made any comments during the cross-examination of Dr. Pine. Juror No. 772906 responded that he had said, "What a bitch." Juror No. 772906 believed he had said it louder than he intended. Three other jurors were questioned, but had not heard anything.

The court stated: "Here is the scenario that we have. We have a juror that I was watching yesterday. He was very animated, mostly during the time that Dr. Pine was on the witness stand. I got the impression that he was excited about the examination. That was the impression I got. But he said something loudly enough that it was overheard by a juror that's seated a little distance away from him, and the juror right next to him, and the court reporter, who was seated in front of me, which was about--it looks like about 15 feet, perhaps. . . . [¶] . . . And I believe the alternate juror, who brought it to our attention first, that he said it more than once. I saw his animation at the time, and . . . I saw his mouth moving, but I never thought he was saying anything out loud. [¶] In addition, he denied using the word 'bitch'. He says he's more likely to use the word 'witch'. And in other words, he's not telling the truth about his nomenclature, number one. And he doesn't remember any of that happening, which I'm having a hard time believing as well."

The court continued: "When I ordered the [jurors] throughout the course of this trial not to form or express an opinion, he said it loudly enough to potentially affect the way that [the prosecutor's] examination would be perceived by others, and he denied--in my mind he did not tell the truth during this mini hearing that we had. [¶] He first of all talked about the fact that [the prosecutor] was beating up on somebody, and she believed he was lying, and thus he was upset with her for having done this because, after all, this guy is credentialed. He's formed an opinion, expressed an opinion about the People's case via calling [the prosecutor] a word that he doesn't use, he says. So in my mind, he has violated the orders of the Court, so I'm going to excuse him."

Defense counsel stated that he did not believe the juror had affected anyone around him, to which the court replied, "I'm not going to bother about the others. I think I have to remove him." Defense counsel said that even if the juror had formed an opinion about the prosecutor, that did not mean he had formed an opinion about the case itself. The court responded: "He's expressed an opinion, and he's actually articulated that opinion, which means that he has an opinion that he's expressed. And he lied to me . . . . He lied. He sat there and lied to me about what he had said and what his intentions were. And then you want me to believe him now, that he actually won't allow that to affect the way he perceives the evidence? In other words, I'm going to put that completely aside, Judge, and I'll be able to view the evidence without even thinking about the fact that I articulated this out loud, try to influence somebody else." When defense counsel still argued that the juror should not be excused, the court said, "No, no. He's gone."

" 'The court may discharge a juror for good cause (see [Pen. Code,] § 1089), which includes a failure to follow the court's instructions. . . .' [Citation.] 'A juror who violates his or her oath and the trial court's instructions is guilty of misconduct.' [Citation.] 'We review a trial court's decision to discharge a juror under an abuse of discretion standard, and will uphold such decision if the record supports the juror's disqualification as a demonstrable reality. [Citations.] The demonstrable reality test "requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that [disqualification] was established." [Citation.] To determine whether the trial court's conclusion is "manifestly supported by evidence on which the court actually relied," we consider not just the evidence itself, but also the record of reasons the court provided. [Citation.] In doing so, we will not reweigh the evidence. [Citation.]' [Citation.] We defer to the trial court's credibility assessments 'based, as they are, on firsthand observations unavailable to us on appeal.' [Citation.]" (*People v. Williams* (2015) 61 Cal.4th 1244, 1262 (*Williams*).)

Defendant argues the record does not reveal a demonstrable reality that Juror No. 761446 could not perform his duties as a juror, thus the trial court abused its discretion in dismissing him. Defendant argues the reasons the trial court gave for dismissing the juror are not supported by the record. In applying the "demonstrable reality" standard, we look at the reasons the trial court gave for dismissing the juror, and the record to determine whether the evidence in the record supports the reasons given by the trial court. (*People v. Armstrong* (2016) 1 Cal.5th 432, 450-451.)

The trial court stated it was dismissing Juror No. 761446 because he had formed and expressed an opinion about the case in violation of the court's instruction, and because he had lied about calling the prosecutor a bitch, consequently the trial court did not trust the juror to fairly judge the case. The instructions the trial court gave relating to this issue are as follows: (1) "During the trial, do not talk about the case or about any of the people or any subject involved in the case with anyone . . . . You must not talk about these things with other jurors, either, until after you begin deliberating. [¶] As jurors, you may discuss the case together only after all the evidence has been presented, the attorneys have completed their arguments, and I have instructed you on the law. After I tell you to begin your deliberations, you may discuss the case only in the jury room and only when all jurors are present[;]" and (2) "Do not make up your mind about the verdict or any issue until after you [have] discussed the case with the other jurors during deliberations."

Thus, the trial court had told the jurors not to talk about the case or any of the people involved or any subject involved in the case, and not to "make up your mind" about the verdict or any issue. The juror's remarks about the prosecutor were about a person involved in the case, and his remarks demonstrated he had made up his mind about an issue because they demonstrated the juror had made a decision regarding the witness's credibility.

This case is similar to *Williams, supra*, 61 Cal.4th 1244. The trial court dismissed a juror who made a comment to other jurors about the credibility of witnesses after she had already been admonished not to talk about the case, then lied to the court about having made the comment. (*Id*. at pp. 1260-1261.) The judge stated the dismissal was because the juror had formed an opinion about the merits of the case in violation of the court's order, had expressed that opinion to other jurors, and when confronted with the statement, had lied to the court about it. (*Id*. at p. 1261.) In affirming the judgment on appeal the Supreme Court stated: "On this record, the trial court did not abuse its discretion in dismissing Juror No. 12. The crux of the court's ruling was its credibility determination that Juror No. 2 was truthful and Juror No. 12 was not. There is no basis to disturb that finding on appeal. Juror No. 12 was well aware that she was not to form an opinion on any matter touching upon the case or to express an opinion to others. Nevertheless, her second remark shows she had formed an opinion about witness credibility. She then shared it with at least one other juror. She compounded her misconduct by lying to the court. Juror No. 12's inability to perform her duty 'appear[s] in the record as a demonstrable reality.' " (*Id*. at pp. 1262-1263.)

In this case, the excused juror did not necessarily form an opinion about the verdict, but he demonstrated, as the Supreme Court stated in *Williams*, that he had formed an opinion on a "matter touching upon the case[,]" i.e., the witness's credibility and the prosecutor's personality. (*Williams, supra*, 61 Cal.4th at p. 1263.) Defendant argues the juror did not lie because he left open the possibility he had used the term "bitch." This is sophistry. When asked what he had said about the prosecutor, he claimed he did not remember. When asked whether he had called her a derogatory term, he said he did not remember. When asked point blank if he had called her a bitch, he said he would have been more apt to call her a witch. He said he did not think he had called her a bitch, but he might have called her a witch. We defer to the trial court's credibility determination.

(*Id.* at p. 1262.) Even on the cold record, the juror's credibility appears lacking. The record supports the trial court's finding that the juror had not been truthful.

Defendant also argues that because some of the surrounding jurors did not hear Juror No. 761446's comments, there is reason to believe he did not make them. We disagree. Two jurors heard Juror No. 761446 use the same term. The court reporter also heard it. The judge observed that Juror No. 761446 appeared "excited." The evidence supports the trial court's determination that Juror No. 761446 made derogatory comments about the prosecutor. Defendant argues there is insufficient evidence Juror No. 761446 was trying to influence the other jurors. This is immaterial as it was not a reason given by the trial court.

The record supports the reasons given by the trial court as a demonstrable reality.

II

Felony-murder

Defendant makes three related arguments regarding her conviction for first degree murder, which may have been based on a felony-murder theory, with kidnapping as the underlying felony.

A. *Felony-murder was an appropriate theory*

The jury was instructed on two theories of murder--deliberate, premeditated murder and felony-murder. The felony-murder instruction was based on the underlying felony of kidnapping. The jury was instructed that kidnapping required: "One, the defendant used physical force to take and carry away an unresisting child; [¶] Two, the defendant moved the child a substantial distance; [¶] Three, the defendant moved the child with an illegal intent or for an illegal purpose; and [¶] Four, the child was under 14 years old at the time of the movement." The jury was also instructed that a parent entitled to custody rights is liable for kidnapping if she takes the child for an illegal purpose, and in this case the illegal purpose was: (1) to commit murder, and (2) to commit child abuse.

Defendant argues the felony-murder theory was inapplicable because it does not apply where the underlying offense (kidnapping) is merely incidental to the killing. She argues that because the trial court gave a felony-murder instruction, she was denied her constitutional rights to due process and to a jury trial. In making the argument that the kidnapping was "incidental," defendant incorrectly conflates two concepts--the independent felonious purpose that is relevant to a felony-murder special-circumstance allegation, and the requirement for purposes of first degree felony-murder that the intent to commit the underlying felony exist either prior to or during the commission of the homicidal acts.

The first concept was set forth in the seminal case of *People v. Green* (1980) 27 Cal.3d 1 (*Green*), abrogated on another point in *People v. Martinez* (1999) 20 Cal.4th 225, on which defendant heavily relies. *Green* involved the felony-murder special circumstance, rather than the first degree felony-murder theory at issue here. (*Green*, at p. 59.) The defendant in *Green* drove his wife to a secluded area, forced her to take off her clothes, shot her in the face, then after she was dead removed the rings from her fingers, and left with her clothes and purse. (*Id*. at pp. 15-16.) The prosecution argued the felony-murder special circumstance was based on the underlying crimes of robbery and kidnapping. (*Id*. at p. 59.) The felony-murder special-circumstance statute required the jury to find the defendant committed the murder " 'during the commission or attempted commission of' " the crime of robbery or kidnapping. (*Ibid*.)

The Supreme Court held the facts of the case did not fit within the felony-murder special circumstance. "[T]he Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not. The Legislature declared that such a distinction could be drawn, inter alia, when the defendant committed a 'willful, deliberate and premeditated' murder 'during the commission' of a robbery or other listed felony. [Citation.] The provision thus expressed a legislative belief that it

was not unconstitutionally arbitrary to expose to the death penalty those defendants who killed in cold blood *in order to advance an independent felonious purpose*, e.g., who carried out an execution-style slaying of the victim of or witness to a holdup, a kidnaping, or a rape. [¶] The Legislature's goal is not achieved, however, when the defendant's intent is not to steal but to kill and the robbery *is merely incidental to the murder . . . because its sole object is to facilitate or conceal the primary crime*. . . . To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes robbery or one of the other listed felonies would be to revive 'the risk of wholly arbitrary and capricious action' condemned by the high court . . . ." (*Green*, *supra*, 27 Cal.3d at pp. 61-62, italics added, fn. omitted.)

Similarly, the merger doctrine once precluded the application of the felony-murder rule in cases where the underlying felony was integral to the homicide. (*People v. Ireland* (1969) 70 Cal.2d 522, 539.) The theory of the merger doctrine is that the underlying felony must be an independent crime, and not a part of the killing itself. Since *Green* was decided in 1980, the Supreme Court has held that the merger doctrine does not apply to a first degree felony-murder case. (*People v. Farley* (2009) 46 Cal.4th 1053, 1119.) Thus, an underlying felony that is incidental to the homicide in the sense that it is an integral part of the homicide and not an independent crime will not support a felony-murder special circumstance, but is sufficient for purposes of first degree felony-murder.

The other concept, that the underlying felony may not be incidental in the sense that the intent to commit the underlying felony must exist either prior to or during the commission of the homicidal acts, is illustrated by *People v. Anderson* (1968) 70 Cal.2d 15, 24, in which the defendant was convicted of first degree murder on two possible theories: (1) deliberate, premeditated murder; and (2) felony-murder committed in the

perpetration of a lewd or lascivious act upon a child (Pen. Code, § 288).[1] Anderson had stabbed the victim over 60 times, including postmortem wounds in the vagina, but no evidence of spermatozoa was found in the victim, on her clothes, or on the bed next to where she was found. (*Anderson*, at pp. 21-22.) In concluding the evidence was insufficient to sustain a first degree felony-murder conviction, the Supreme Court stated: "[T]he evidence must establish that the defendant harbored the felonious intent either prior to or during the commission of the acts which resulted in the victim's death; evidence which establishes that the defendant formed the intent only after engaging in the fatal acts cannot support a verdict of first degree murder based on section 189." (*Id*. at p. 34.)

This concept flows from the fact that the purpose of the felony-murder rule is to deter negligent or accidental killings that occur during the perpetration of one of the inherently dangerous felonies enumerated in section 189. (*People v. Washington* (1965) 62 Cal.2d 777, 781; *People v. Farley, supra*, 46 Cal.4th at p. 1121.) This purpose is served only if the intent to commit the underlying felony is not an afterthought to the killing itself.

Only the second concept is relevant to this case, since there was no felony-murder special-circumstance allegation. The prosecution's theory, supported by the evidence, was that defendant kidnapped the infant in order to keep her from being discovered while defendant neglected her to the point of fatally starving her. Because this intent was harbored concurrent and prior to the actions which led to the infant's death, and was not an intent formed only after engaging in the fatal acts, the jury was properly given a first degree felony-murder instruction pursuant to section 189.

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[1] Undesignated statutory references are to the Penal Code.

B. *The kidnapping instruction was appropriate*

Defendant makes a related argument regarding the kidnapping instruction. The jury was instructed that the crime of kidnapping required proof that defendant used physical force to take and carry away an unresisting child, that defendant moved the child a substantial distance, that defendant moved the child with an illegal intent or for an illegal purpose, and that the child was under the age of 14. The jury was also instructed that for this case, an illegal purpose or intent was defined as the purpose or intent to commit murder, and/or the purpose or intent to commit child abuse.

Defendant argues the trial court erred in deviating from the pattern instruction to tell the jury that the illegal purpose or intent was to commit murder or child abuse. Defendant is wrong.

It has long been the law of this state that a defendant's purpose or motive is not an element of kidnapping unless the child is incapable of giving consent. (*People v. Oliver* (1961) 55 Cal.2d 761, 765, 768.) In such a case, a defendant is guilty of kidnapping "only if the taking and carrying away is done for an illegal purpose or with an illegal intent." (*Id*. at p. 768.) It was thus proper for the trial court to instruct the jury that the taking had to be done for an illegal purpose or with illegal intent in order to satisfy the taking and carrying away element of kidnapping.

Defendant's claim is that by naming the illegal purpose as murder or child abuse, the trial court reinforced the felony-murder theory, which was an improper theory. As we have determined the felony-murder theory was not improper, there is no merit to this argument. Furthermore, since we have considered and rejected defendant's argument regarding the kidnapping instruction, we need not consider her claim that her trial counsel was ineffective for failing to object to the instruction.

C. *Erroneous felony-murder instruction was harmless*

CALCRIM No. 540A instructs, in part, that first degree murder under a felony-murder theory requires the jury to find: (1) that the defendant committed the underlying

felony (here kidnapping); (2) that the defendant intended to commit the underlying felony (kidnapping); and (3) that while committing the underlying felony (kidnapping), the defendant caused the death of another person. The trial court gave a modified version of CALCRIM No. 540A as follows: "Murder in the commission of a kidnapping is felony murder. . . . To prove that the defendant is guilty of a first degree murder under this theory, the People must prove[] that, one, the defendant committed the crime of kidnapping; two, the defendant *intended to commit murder and/or child abuse* and, three, while committing the crime of kidnapping, the defendant caused the death of another person." (Italics added.) The trial court then defined the crime of kidnapping as requiring an illegal intent or illegal purpose, specifically murder and/or child abuse. Defendant argues the trial court erred in giving the italicized language, because the jury should have been instructed on the general intent to kidnap rather than the specific intent to murder or commit child abuse.

The trial court apparently confused the intent required for felony-murder (intent to commit the underlying felony) with the purpose required for kidnapping where, as here, the victim was an unresisting infant. In the kidnapping of an unresisting child, the prosecution must prove that the taking and carrying away was done for an illegal purpose, or with an illegal intent. (*People v. Oliver*, *supra*, 55 Cal.2d at p. 768.) As indicated, the trial court properly instructed the jury of this when it gave the kidnapping instruction. The trial court erred in substituting the kidnapping purpose or intent requirement for the intent required for felony-murder.

However, the error was harmless beyond a reasonable doubt. As defendant acknowledges, the purpose of this part of the instruction is to prevent a felony-murder conviction where the crime of murder is completed before the intent to commit the underlying crime is formed. (*People v. Silva* (2001) 25 Cal.4th 345, 371-372.) Here, there was no question but that the intent to kidnap was formed before the killing

occurred, because the kidnapping itself began prior to the actions leading to the infant's death.

III

Evidence of Prior Pregnancy

Both the prosecution and the defense sought the admission of evidence of defendant's prior pregnancy. The prosecution sought admission of the evidence to prove intent, common plan or scheme, motive, knowledge, and lack of mistake. The defense sought admission of the evidence in connection with the opinion of one of its experts, who testified there was a significant psychological connection between the first and second births, and that it is common for women who are unable to resolve the grief and loss associated with the death of one child to have another child to replace the first one.

The court, with defense counsel's agreement, gave the following instruction:

> "The People presented evidence of other acts by the defendant regarding the pregnancy, birth, and death of her Baby Bella, baby No. 1. You are not required to, but you may consider this evidence for any purpose including,
>
> "One, intent. The defendant acted with the intent to kill;
>
> "Two, motive. The defendant had a motive to commit the offense alleged in this case;
>
> "Three, knowledge. The defendant had knowledge on birthing a child;
>
> "Four, common plan or scheme. The defendant had a plan or scheme to commit the offense alleged in this case.
>
> "In evaluating this evidence for the purposes mentioned above, consider the similarity or lack of similarity between the acts and the charged offense. If you conclude that the defendant committed the acts and for purposes mentioned above, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of murder or manslaughter. The People must still prove the charge beyond a reasonable doubt."

Defendant argues the trial court erred in giving the instruction because it did not instruct the jury that the evidence could not be used to find defendant had a bad character. Because the trial court was not obligated to provide a limiting instruction, defendant forfeited the issue by failing to request a correction of the given instruction.[2] (*People v. Chism* (2014) 58 Cal.4th 1266, 1308.) As defendant has raised an ineffective assistance of counsel argument, we conclude that, while defendant is correct that evidence of specific acts are inadmissible to prove her disposition to commit such acts, the instruction given was harmless beyond a reasonable doubt, and defendant suffered no prejudice from the trial court's failure to limit the uses of the evidence. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)

Both sides wanted evidence of the first pregnancy admitted, thus the jury would have heard the evidence, even if it had been instructed not to consider it to prove defendant's bad character. The trial court did not affirmatively tell the jury it could use the evidence to prove defendant's bad character. The prosecutor did not argue the first pregnancy was evidence of bad character. Rather, the prosecutor argued the first pregnancy showed knowledge and lack of mistake. Furthermore, the trial court instructed on the elements of first degree murder, and told the jury it must be convinced beyond a reasonable doubt that each element had been proved. Those elements did not include a

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[2] The People argue the instruction was invited error because defense counsel agreed to the modified version of CALCRIM No. 375 given by the trial court. However, the invited error doctrine requires "that counsel made a conscious, deliberate tactical choice between having the instruction and not having it. If counsel was ignorant of the choice, or mistakenly believed the court was not giving it to counsel, invited error will not be found." (*People v. Cooper* (1991) 53 Cal.3d 771, 831.) While the record shows defense counsel acquiesced in the instruction as given, it does not show that he made a conscious, deliberate tactical choice to eliminate the limiting language regarding the use of the evidence of the first birth.

bad character or propensity to commit murder. Under these circumstances, the error was harmless beyond a reasonable doubt.

IV

Substantial Evidence of Causation

Defendant argues there was insufficient evidence she caused the baby's death because the experts were unable to determine the exact cause of death. We disagree.

The pathologist testified that the body was mummified when he examined it. The baby was full term, and there was no evidence of congenital defects. There were also no signs of injury or obvious trauma. The pathologist was unable to determine the cause of death, and unable to exclude a number of causes, including asphyxia, infection, starvation, or dehydration. Defendant's expert opined that defendant had delivered precipitously (i.e., not a long labor) and that the umbilical cord had been torn, which led to bleeding. This would have left the baby in a weakened state. He also opined that the baby "probably" had pneumonia or some kind of infection. Defendant herself stated when questioned, "I guess she just starved." The baby lived for three days.

In point of fact, it does not matter what the exact cause of death was. The baby was alive for three days after being born. Defendant was the only person who had any contact with the baby because she intentionally hid the baby from others. No other person could have caused the death of the baby. The only question is whether defendant had sufficient intent for first degree murder. The jury was instructed that it could find first degree willful, deliberate, and premeditated murder if defendant either intended to kill the baby or if she intentionally and knowingly committed an act, the natural and probable consequence of which was dangerous to the baby's life, "*at the time she acted she knew her act was dangerous to human life*, and she deliberately acted with conscious disregard to human life." (Italics added.) Whether she starved the baby or failed to get medical attention for it when it developed an infection or some other life-threatening condition, defendant either intentionally killed the baby by withholding nutrition, or

failed to get medical care for the baby knowing the natural and probable consequences of that failure were dangerous to the baby's life.

V

Corpus Delicti Instruction

In a related argument, defendant claims the trial court committed prejudicial error by not giving sua sponte a corpus delicti instruction. The instruction (CALCRIM No. 359) states in part: "The defendant may not be convicted of any crime based on her out-of-court statements alone. You may rely on the defendant's out-of-court statements to convict her only if you first conclude that other evidence shows that the charged crime was committed. [¶] That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed."

The trial court is required to give a corpus delicti instruction sua sponte where the defendant's extrajudicial statements form part of the prosecution's evidence. (*People v. Howk* (1961) 56 Cal.2d 687, 707.) However, omitting the instruction is harmless if there is no reasonable probability the jury would have reached a result more favorable to the defendant had the instruction been given. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1181.)

The omission of the instruction was harmless in this case. As the instruction states, the other evidence that a crime was committed need only be slight. "The independent proof may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible." (*People v. Alvarez*, *supra*, 27 Cal.4th at p. 1171.) The evidence a crime was committed was more than slight here. Forensic evidence showed that the baby was full term and had no congenital defects that would have led to her death. In fact, there was evidence the baby lived a few days after her birth, because two people reported hearing her cry. There was testimony from witnesses other than defendant that she left the baby the night following the morning the baby was born to ride

bikes with her friends, and that they did not return until 1:30 the next morning. A Winco Foods grocery store receipt was found in defendant's truck for that same night, showing defendant purchased cookies, but not baby formula or other baby items, even though defendant claimed the baby would not nurse. The jury could infer from this evidence that defendant not only neglected the baby, but also that she had no intention of feeding the infant, and no belief that the baby would live long enough to need clothes or diapers. The jury could also infer defendant's intent from the fact that she moved the baby from the apartment when Smith was headed to the apartment to check out the crying.

On these facts, any error in failing to give the corpus delicti instruction was harmless error because it is not reasonably probable that a result more favorable to defendant would have been reached had the instruction been given. (*People v. Watson* (1956) 46 Cal.2d 818, 837.)[3]

VI

Limited Remand

While the appeal has been pending, the Legislature raised the age of persons eligible for youth offender parole hearings from 23 to 25 years of age at the time of the offense. (Stats. 2017, ch. 675, § 1.) In a supplemental brief, defendant, who was 23 at the time of the offense, seeks a limited remand under recently amended section 3051 to allow her an opportunity to make a record of information relevant to her future youth offender parole hearing. Respondent does not oppose a limited remand for this purpose. We will remand for this purpose pursuant to *Franklin*, *supra*, 63 Cal.4th 261.

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[3] We find virtually no merit to defendant's individual assignments of error, thus reject her claim of cumulative error as well.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court for the limited purpose of a determination consistent with *People v. Franklin* (2016) 63 Cal.4th 261.

/s/
Blease, Acting P. J.

We concur:

/s/
Butz, J.

/s/
Duarte, J.